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SUPREME COURT, U.S.

No. 80-5551

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

WILLIAM E. CONRAD, APPELLANT

v.

WARREN E. BURGER, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530
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Pursuant to Rule 16 of the Rules of this Court, appellees move to dismiss on the ground that the appeal is not within this Court's jurisdiction.

This is a direct appeal from a decision of a single judge district court dismissing appellant's in forma pauperis complaint as frivolous or malicious, pursuant to 28 U.S.C. 1915(d).[1/] The court cited five previous actions brought in the district court in support of its dismissal order. Appellant is attempting to appeal the district court's order directly to this Court.

1/ Appellant's motion to proceed in forma pauperis was granted by the district court on August 20, 1980 (Appellant's Brief p. 1). On September 10, 1980, the district court denied, as beyond its authority, appellant's motion to file a notice of appeal to this Court in forma pauperis (ibid.).

This Court lacks jurisdiction to entertain this appeal. The single judge district court did not hold an Act of Congress unconstitutional. See 28 U.S.C. 1252, 1253.[2/] Nor can this appeal be viewed as a petition for certiorari before judgment, because appellant chose not to seek review in the court of appeals. See 28 U.S.C. 1254, 2101(e). See also United States v. Nixon, 418 U.S. 683, 690-692 (1974); Stern & Gressman, Supreme Court Practice 54-55 (5th ed. 1978).

It is therefore respectfully submitted that the appeal should be dismissed for lack of jurisdiction.[3/]

WADE H. McCREE, JR.
Solicitor General

DECEMBER 1980

2/ Appellant apparently asserts that this Court has direct review jurisdiction under the Act of March 3, 1891, ch. 517, §5, 26 Stat. 827 (codified as Section 238 of the Judicial Code of 1911, 36 Stat. 1157, 1167). This provision was limited by amendment in the Act of February 13, 1925 (Pub. L. No. 415, §238, 43 Stat. 938), and the broader jurisdictional grant was withdrawn by repeal of Section 236 of the Judicial Code (43 Stat. 941 (1925)).

3/ The Court has jurisdiction to dismiss this patently frivolous appeal despite appellant's having named its members in the complaint. When an appeal from a district court is properly before the Court but a quorum is unavailable to hear and determine the case, 28 U.S.C. 2109 authorizes the Chief Justice to remit the case to the court of appeals for final determination. In our view, Section 2109 does not apply to an improper appeal. Cf. Mansfield, Coldwater & Lake Michigan R. Co. v. Swan, 112 U.S. 379, 381 (1884). Nor is 28 U.S.C. 455 applicable here. See Pilla v. American Bar Ass'n, 542 F.2d 56, 57-59 (8th Cir. 1976).